No. 8094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

H. H. MCPIKE,
United States Attorney,
ROBERT L. MCWILLIAMS,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration and Naturalization Service,
Post Office Building, San Francisco,
On the Brief.

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STATEMENT OF THE CASE.

Fundamentally this appeal from an order (T. 51) denying a petition for a writ of habeas corpus involves the same points which this Court passed upon in *Kishan Singh v. District Director of Immigration,* No. 8078, decided April 20, 1936.

FACTS OF THE CASE.

Appellant, an East Indian alien, is held for deportation (Ex. A, p. 7) under the Immigration Act approved May 26, 1924 (8 U. S. C. A., Sections 213 (a), 213 (c), 214).

Appellant's claim is that he has been continuously within the United States since 1912, and hence that the 1924 statute is inapplicable. In their preliminary investigation leading up to the institution of the deportation proceedings, the immigration authorities obtained sworn statements from five residents of the vicinity of Mexicali, Mexico, who testified that appellant lived and worked in that vicinity for several years immediately prior to 1931 (T. 30-38). Two of these witnesses were able to recall appellant by the name "Tomas Singh" (T. 32, 33). One of them states: "Tomasito (diminutive of Tomas) was a very good friend of mine, but I have told you that I would tell the truth, so I must tell you that he was here in Mexico" (T. 32). Three of them recalled that he associated principally with Mexicans while there, rather than with his own countrymen (T. 32, 33, 35). Two of these witnesses placed him at the Shank No. 1 Ranch of the Colorado River Land Company there (T. 32, 35). Subsequent investigation resulted in two former foremen of that company being found and interviewed. One of the latter testified that appellant worked for that company in Mexico under his immediate supervision for about a year in 1926 and 1927 (T. 43-44). The other testified that during 1927 and 1928 appellant worked intermittently under his direct supervision for about a year for the same company in Mexico (T. 45-46). Both these latter witnesses also recalled that appellant was known in Mexico as Tomas Singh or Tomas Juan (T. 43, 45). Both have subsequently seen appellant in the United States and both refer to him as having been located at the Wil-

son Ranch near Fowler, California, in 1933 (T. 45, 46). Although appellant denies that he knows these witnesses, he admits that he has been employed at the Wilson Ranch near Fowler, California, since 1932 (T. 48).

Appellant presented two East Indian witnesses who simply testified that he came to the United States from India with them on the SS. "Minnesota" in February, 1912, but neither of these persons saw appellant between 1912 and 1931, and neither knows whether or not he was in the United States during that time (T. 48-50).

Appellant presented a letter (Ex. A, p. 107) and an affidavit (Id. p. 111) signed by an employee of the American Smelting and Refinery Company at Garfield, Utah, certifying as to his alleged employment by that company during 1924 and 1925. Even if it were shown that appellant is the person referred to therein, it would not tend to controvert the testimony of the government witnesses regarding his presence in Mexico *from 1926 to 1931.* The letter states that "*Tharman* Singh started to work here as a laborer 6-11-24 and quit 5-21-25" (Ex. A, p. 107), while the affidavit states that *Thaman* Singh, worked for the company from May 6, 1925, to May 8, 1925, and from November 24, 1925, to December 14, 1925 (Id. p. 111). Counsel suggests that these documents refer to the employment of two different men. However, appellant presented both documents (T. 13-17), and although he claims to have worked for that company during the period of one year mentioned in the letter

(T. 13), he claimed to recognize as his own signature the signature (Ex. A, p. 113) of the person Thaman Singh mentioned in the affidavit (T. 19-20). Clearly the latter document cannot refer to appellant, because it shows the subject's employment by the company to have aggregated only 23 days, and neither appellant's description, marital status nor place of birth corresponds to the facts shown by the company's record regarding that employee (T. 11, 14-15, 16). Another East Indian who applied for a reentry permit in 1928, claiming the same original entry into the United States in February, 1912, as that claimed by appellant, corresponds with the record of the American Smelting and Refinery Company in all details (T. 18). Appellant admits knowing that person (T. 18-19), but denies knowledge of the latter having claimed the 1912 arrival record which he claims (Ex. A, pp. 49-50).

Regarding the period in which the government witnesses place him in Mexico, appellant claims that he was in fact working for the Bridal Veil Lumber Company (also referred to in the record as "Bradeville" Lumber Company) in Oregon, from 1926 to 1929 (T. 25, 29), and came to California in 1930, but "didn't work any place—just bumming around" (T. 25). However, the employment records of the Bridal Veil Lumber Company for the years 1925 to 1930 do not contain appellant's name (T. 26), and the foreman of the East Indians who were employed by that company during that period, testified that no such person had ever worked for the company (T. 27-28).

ARGUMENT.

Appellant argues that the burden of proof is on the government here, because he has shown that he did enter the United States legally in 1912. However, the 1912 entry is not in dispute. The government produced testimony of seven persons showing that during the period from 1926 to 1931 appellant was in Mexico. He makes no claim of subsequent lawful entry into the United States, but simply denies that he was out of the United States at all during that period. The 1912 entry can avail him nothing in the face of the evidence of his presence in Mexico after the 1924 Immigration Act went into effect.

In

Wong Back Sue v. Connell, 233 F. 659, 664,

this Court said, relative to an identical situation:

> "But the sworn statements of witnesses attached to the record filed by the petitioner clearly show that the alien was seen in Mexico shortly before he was found in the United States. The certificate of residence held by the alien became of no avail to him after he left the United States without procuring a return certificate."

In the similar case of

Bun Chew v. Connell, 233 F. 220, 221,

this Court said regarding the same contention:

> "The answer to this is that by the evidence it was shown that appellant had left the United States and had gone to Mexico, and that he was there as late as April 1, 1912, and he produced no evidence that in re-entering the United States he complied with the law and did not make a fraudulent entry."

See also:

8 *U. S. C. A.* Sec 221;

U. S. ex rel. Orisi v. Marshall (C. C. A. 3), 46 F. (2d) 853, 854;

Kjar v. Doak (C. C. A. 7), 61 F. (2d) 566, 569, 570.

In the cases cited at page 4 of appellant's brief the deportation was sought upon the theory that, although the alien was regularly admitted, such admission had been obtained by fraud. None of those cases involved any issue as to the fact of absence or reentry.

The testimony (hereinabove outlined) of the seven witnesses as to appellant's presence in Mexico between 1926 and 1931 is positive, detailed and convincing. Four of them place him at the same project there, and two of the latter not only have seen him subsequently in the United States, but connect him with the Wilson Ranch near Fowler, California (where appellant admits he is employed).

Appellant contends that the introduction of the statements taken from the Mexican witnesses prior to the application for the warrant of arrest rendered the hearing unfair, and that he was afforded no proper opportunity to cross-examine those witnesses.

This contention is ruled adversely by the recent decision of this Court in the case of

Kishan Singh v. Cahill, No. 8078, supra,

and the authorities therein cited. In the case at bar

the same offer was made to produce these government witnesses for cross-examination at Calexico, California (the point nearest their place of residence), as was made in the *Kishan Singh* case (T. 41-42).

Appellant argues that identifications by photograph are insufficient. This same contention was made by appellant in the *Kishan Singh* case, supra. Identifications are frequently made in this manner, both in judicial proceedings (*Wigmore on Evidence,* Sec. 660; *Wilson v. U. S.,* 162 U. S. 613, 621, 16 S. Ct. 895, 899, 40 L. Ed. 1090, 1096), and in these administrative deportation proceedings (*Kamiyama v. Carr* (C. C. A. 9), 44 F. (2d) 503, 504; *Wong Back Sue v. Connell,* supra). The contention goes only to the weight of the testimony, and all such questions, of course, are for the Department.

In *Yee Et v. U. S.,* 222 F. 66, cited by appellant, the proceedings were *judicial* and the deportation orders were affirmed, although the Court remarked that certain witnesses who resided in the same city in which the hearing was held before the United States Commissioner were not produced at the hearing.

In *Backus v. Owe Sam Goon,* 235 F. 847, which appellant cites, the transfer of jurisdiction from the judiciary under the Chinese Exclusion Act to the executive under the Immigration Act of 1907, rested entirely upon the statement of one witness that he had seen the appellee a number of times in a laundry in Mexico, and no opportunity was given to cross-

examine this witness at any time or place. The same situation existed in the case of *White v. Tom Yuen,* 244 F. 739, which appellant cites.

In *Ex parte Bunji Une,* 41 F. (2d) 239, also cited by appellant, there was no direct evidence that the alien had been outside the United States after July 1, 1924, except a date alleged to have been given by him prior to his arrest without the services of an interpreter, and no opportunity was afforded the alien to cross-examine the government witnesses at any time or place.

In the case of *Lee Mea Yong* (D. C. N. D. Cal.), unreported, the question was as to the sufficiency of statements of persons interviewed in China to establish that the applicant had lost her American citizenship through marriage to an alien.

Appellant also complains of the introduction in evidence of the statements taken from the witnesses Gonzales and Velasco (T. 43-46), and the report of the investigation and statement of the foreman at the Bridal Veil Lumber Company (T. 25-28).

No objection was made at the hearing by appellant's counsel to the introduction of these documents (T. 28-29, 47), nor was any request made that these persons be produced for cross-examination. Request for opportunity to cross-examine government witnesses was made only as to the Mexican witnesses, who gave statements at Calexico, California (Ex. A, pp. 82-83 and 85-86). If appellant's counsel had in-

dicated any desire at any time in the course of the hearings (which extended over nine months), to cross-examine any of these other witnesses, undoubtedly the same opportunity would have been afforded to cross-examine them at the points nearest their places of residence as was offered with reference to the five Calexico witnesses.

It has been repeatedly held that failure to object at the hearing to the introduction of such statements, or to request the production for cross-examination of the persons making them, constitutes a waiver.

Ng Kai Ben v. Weedin (C. C. A. 9), 44 F. (2d) 315, 317;

Imazo Itow, et al., v. Nagle (C. C. A. 9), 24 F. (2d) 526, 527;

U. S. ex rel Diamond v. Uhl (C. C. A. 2), 266 F. 34, 40.

Appellant states in his brief that a comparison of the signatures upon the checks endorsed in the names of Tomas Singh, and Tomas Juan (Ex. A, p. 138), with appellant's signature "shows conclusively that he did not endorse said checks". This point, however, has been decided against him by the Secretary of Labor (Ex. A, p. 10), who found that the signature on the check compares much more favorably with appellant's signature than does the signature from the records of the American Smelting and Refinery Company, which appellant claims to be his.

Appellant also refers to certain documents in connection with his alleged employment with the latter

company as being incompetent and introduced without opportunity to cross-examine the persons making them. As pointed out in our statement of facts, the letter and the affidavit certifying to the employment record of that company were produced by appellant himself, and mention is made in said affidavit of the fact that the signature on their record had been sent to the immigration authorities. We see nothing else from that company except the letter transmitting said signature (Ex. A, p. 113), and a letter (Id. p. 127) which contains practically the same information as is contained in the affidavit (Id. p. 111) which appellant presented. There is also in the record a report (Id. pp. 132, 133) submitted by an inspector who called at the plant and examined the original of the employment record set forth in the affidavit which appellant himself presented. No objection was made at the hearing to the introduction of any of this matter relative to his alleged employment at the American Smelting and Refinery Company, nor was there any request made for opportunity for cross-examination (Id. pp. 54-66, 76-77). We fail to see any unfairness in this regard, nor can we reconcile appellant's present contention that the signature and the aerial view of the plant were not properly proven with the fact that his own testimony at the hearing purported to identify both (T. 19-20, 22).

CONCLUSION.

We submit that the contentions of appellant are without merit, and that the order of the Court below was correct and should be affirmed.

Dated, San Francisco,
April 24, 1936.

H. H. McPIKE,
United States Attorney,
ROBERT L. McWILLIAMS,
Assistant United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration and
Naturalization Service,
On the Brief.